In the Supreme Court of the United States.

Postal Telegraph-Cable Company, Plaintiff in Error, against *The Borough of New Hope, Defendant in Error.*	October Term, 1903. No. 92.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error contends:

1. That the Court below should not have submitted the case to the jury, but should have decided the question of the reasonableness of the ordinance itself; and

2. That the verdict should not be permitted to stand, because it was for a less amount than the plaintiff was entitled to recover, under the evidence, if entitled to recover at all.

In reply the defendant in error respectfully submits:

1. That this case is ruled by the decision of this Court in the case of the Atlantic and Pacific Telegraph Company v. City of Philadelphia (190 U. S., 817), rendered June 1, 1903, in which it was said:

> "It may be conceded that, generally speaking, whether an ordinance be reasonable is a question

> for the Court. As said by Judge Dillon, in his work on Municipal Corporations (4th ed., vol. 1, §. 327): 'Whether an ordinance be reasonable and consistent with the law or not *is a question for the Court*, and not the jury, and evidence to the latter on this subject is inadmissible.' While this may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet when it turns on the amount of a license charge, it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony."

It is contended here by the plaintiff in error that the ordinance in question is unreasonable and therefore void, because of the *amount* of the license fees which it imposes, and not because of the *character* of the regulations which it prescribes. This case and that of Western Union Telegraph Company v. Borough of New Hope (187 U. S., 419), decided January 5, 1903, involve a construction of the same ordinance. They were considered together in the Superior Court of Pennsylvania, and this case was decided in a *per curiam* opinion, as follows:

> "This case differs in no essential features from the case of the same borough against the Western Union Telegraph Co., No. 101, October term, 1900, in which we have this day filed an opinion. Judgment affirmed."

(See Transcript of Record, page 17). The Supreme Court of Pennsylvania disposed of the appeal from the Superior Court in a *per curiam* opinion, as follows:

"The judgment in this case is affirmed on the opinion of Judge Rice of the Superior Court."

(See Transcript of Record, page 13).

In both cases the learned trial judge submitted the question of the reasonableness of the license fees prescribed, to the jury, under the evidence, and in doing so, it is submitted, he followed the law as since declared by this Court.

2. That the rendering of a verdict for an amount less than the plaintiff's claim, the evidence being uncontradicted, is not an error of which the plaintiff in error (the defendant below) can be heard to complain.

The rule is well settled that, where a jury gives the plaintiff less than he is entitled to receive upon the finding of the issue in his favor, it is an error of which the plaintiff alone can complain, and if he submits to the verdict, the defendant cannot be heard to insist that it shall be set aside because it is unjust to the plaintiff. Wolf v. Goodhue Fire Ins. Co., 43 Barb., 400; Lamberty v. Roberts, 31 N. Y. S. R., 148. A verdict in an action for damages in favor of the plaintiff will not be set aside at the instance of the defendant because it was for one-half of the amount that the plaintiff claimed was due him, though the evidence as to the amount due was uncontradicted. Alderman v. Cox, 74 Mo., 78. A party against whom a verdict is rendered is not entitled to a new trial upon the ground that the other party ought to have recovered more or nothing. Wright v. Griffey, 44 Ill. App., 115. A new trial will not be granted at the instance of the defendant, when the plaintiff recovered apparently less, rather than more, than the evidence warranted. Smith v. Lee, 82 Ga., 674.

It appears from the record (page 20) that the attorney for plaintiff after the rendition of the verdict paid the verdict fee, whereupon judgment was entered thereon. The

plaintiff thereby accepted the verdict and waived any right, which it may have had, to complain.

3. That there is no Federal question involved in this case as it comes before this Court.

The writ of error was allowed upon the ground set forth on page 2 of the record, to wit, that the appellant was entitled to "a right, title, privilege and immunity * * * claimed under the Constitution of the United States, article one, section eight, clause three, providing amongst other things, that Congress shall have the power to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It appears from the whole record that the Federal question raised by the plaintiff in error was whether the provisions of this ordinance amounted to a regulation of interstate commerce. This was decided in the case of the Western Union Telegraph Company v. Borough of New Hope, *supra*, and the Court will not reconsider it in this case.

> "When a proposition has once been decided by the Supreme Court of the United States, it can no longer be said that in it there still remains a Federal question. More correctly it is said that there is no question State or Federal."
>
> Mr. Justice Brewer in Kansas v. Bradley, 26 Fed. Rep., 289, 290.

It has also been held that when the Federal cause of action fails relief cannot be granted upon another ground. Larrowe-Loisette v. O. Loughlin, 88 Fed. Rep., 896.

It is therefore respectfully submitted that the writ of error should be dismissed for want of jurisdiction.

WILLIAM C. RYAN,
For Defendant in Error.